

Before the
Federal Communications Commission
Washington, D.C. 20554

MAY 28 1998

In re

Amendment of Section 73.202(b))	MM Docket No. 98-29
Table of FM Allotments)	RM-9190
FM Broadcast Stations.)	
(Indian Wells, California))	
To: Chief, Allocations Branch)	

REPLY COMMENTS OF PROFESSIONAL BROADCASTING, INCORPORATED

Professional Broadcasting, Incorporated ("PBI"), by its attorneys, respectfully submits these reply comments in opposition to the Petition for Rulemaking submitted by Festival City Educational Broadcasters ("Festival City"), which the FCC has accepted as a counterproposal in MM Docket No. 98-29.^{1/} In its initial comments filed in this proceeding on April 27, 1998, PBI reiterated its interest in filing a construction permit application for Channel 238A in Indian Wells, California, if that channel is allotted as proposed in the Commission's *Notice of Proposed Rule Making* ("Notice") in MM Docket No. 98-29, DA 98-420 (rel. March 6, 1998). Festival City, however, proposes that Channel 238A be assigned to Indio, California for use on a noncommercial basis. PBI's Indian Wells proposal is preferred over the Indio counterproposal because Indio, unlike Indian Wells, is already served by four local aural services. Under the Commission's established FM allotment priorities, the Indian Wells proposal must prevail.

^{1/} See Public Notice, Report No. 2276, Office of Public Affairs (rel. May 13, 1998).

I. Indian Wells Is Deserving of the Allotment of Channel 238A.

As discussed in PBI's May 12, 1998, reply comments, allotment of Channel 238A to Indian Wells would represent the community's first local service. As further discussed in the reply comments, Indian Wells is well deserving of this assignment. Indian Wells is an incorporated city with a population of 2,647. It has its own city hall and a fully functioning city government. Indian Wells is served by a weekly newspaper and offers a rich array of cultural and sports events including a lecture series, a jazz festival, and major golf and tennis tournaments. Moreover, a large number of businesses are located in Indian Wells, including five hotels, four dentists, four beauty salons, three banks, a dry cleaner, and a department store.^{2/} As such, Indian Wells merits community status for FCC allotment purposes.^{3/}

II. Indian Wells Satisfies the Commission's Third FM Allotment Priority.

Compared with Festival City's Indio counterproposal, the Indian Wells proposal better satisfies the Commission's FM allotment priorities. In its *Second Report and Order* in BC Docket No. 80-130, the Commission established four priorities for allotment of FM channels.^{4/} The first priority is first full-time aural service. The second priority is second full-time aural service. The

^{2/} See Reply Comments of Professional Broadcasting Incorporated, MM Docket No. 98-29 (May 12, 1998) at 2-3.

^{3/} See, e.g., *Semora, North Carolina*, 67 R.R.2d 610, 611-12 (1990) (concluding that an unincorporated town of 150 residents and a small number of local businesses qualified as a community for FM allotment purposes).

^{4/} See *Second Report and Order, Revision of FM Assignment Policies and Procedures* (BC Docket 80-130), 90 F.C.C.2d 88 (1982). See also *Greenup, Kentucky and Athens, Ohio*, 68 R.R.2d 1437, 1438 (1991) ("Conflicting proposals for an amendment of the FM Table of Allotments are compared using the allotment priorities set forth in *Revision of FM Policies . . .*").

third priority is first local service. The fourth priority is other public interest matters. The second and third allotment priorities are weighted equally.^{5/}

Because both Indian Wells and Indio enjoy multiple full-time aural service, the first and second allotment priorities are not at issue. Unlike Indio which already serves as the community of license of four stations, however, Indian Wells currently does not serve as the community of license for any radio broadcast station. A grant of PBI's petition for rule making would enable PBI to provide the community's first local aural service and fulfill this as-yet unsatisfied need. Indio fails to satisfy the third allotment priority because it already enjoys four local audio transmission services. Thus, under the third allotment priority, Indian Wells prevails.

III. The Fourth Priority Is Subordinate to the Third Priority.

When the choice between competing proposals is resolved by the third priority, the Commission need not reach the fourth priority. The Commission made clear in Docket 80-130 that first local service is greater "in terms of importance" than other matters of public interest.^{6/} Under binding precedent, then, Indian Wells' satisfaction of the third allotment priority is superior to Indio's satisfaction of the fourth priority. The noncommercial status of the proposed Indio station can only

^{5/} See *Revision of FM Assignment Policies*, 90 F.C.C.2d at 91.

^{6/} 90 F.C.C.2d at 92. See also *Sanford and Robbins, North Carolina*, 6 CR (P & F) 71, 73 (1997) ("In considering the proposals before us, only one of them, [the] proposal at Robbins, would provide a first local aural transmission service which triggers Allotment Priority 3. The proposals at Sanford would fall under Allotment Priority number 4[.] . . . Accordingly we will grant the proposal to allot Channel 276A at Robbins . . . as the community's first local aural transmission service").

be taken into account as one of many public interest factors under the fourth priority and is insufficient to overcome the Indian Wells proposal's satisfaction of the third priority.^{2/}

IV. Conclusion

Allotment of Channel 238A to Indian Wells, an incorporated city with its own government, a sizable population, and a large number of local commercial establishments and social organizations, would provide the first local aural service to a deserving community and result in a preferred arrangement of allotments. Accordingly, PBI respectfully requests that the Commission grant its petition for rule making and allot Channel 238A to Indian Wells, California, as that community's first local aural service, in preference to the counterproposal for allotment of Channel 238A in Indio, California.

Respectfully submitted,
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^{2/} Noncommercial status is clearly subordinate to first local service. See, e.g., *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignment*, 57 R.R.2d 863 (1984). In that order, the FCC assigned numerical weights to established criteria to provide for the computer application of the allotment criteria established in Docket 80-130. First aural service was assigned "4"; second aural service and first local service were assigned "3"; and public interest factors, such as noncommercial radio service and minority service, were assigned only "2." This indicates that the third priority is of greater importance than the fourth priority. Noncommercial status, therefore, cannot trump first local service.

CERTIFICATE OF SERVICE

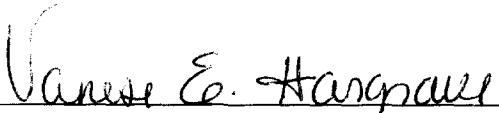
I, Vanese E. Hargrove, a secretary in the law firm of Dow, Lohnes and Albertson, do hereby certify that on this 28th day of May 1998, copies of the foregoing **COMMENTS OF PROFESSIONAL BROADCASTING INCORPORATED** were sent by U.S. mail, first class, postage-prepaid, to the following, except where service by hand is otherwise indicated:

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